APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND FILED JULY 25, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued July 10, 2002
Decided July 25, 2002

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01-4372

MARK WILKINSON,

Petitioner-Appellant,

v.

JONATHAN R. WALLS,

Respondent-Appellee.

Appendix A

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 98 C 3430

George W. Lindberg,
Judge.

ORDER AND JUDGMENT

In 2001 the district court granted Mark Wilkinson a certificate of appealability on the following issue: whether it should have conducted an evidentiary hearing prior to deciding the merits of Wilkinson's claim of ineffective assistance of counsel. Because an evidentiary hearing was not required, we affirm.

By the spring of 1991 Wilkinson's relationship with his wife, Gilda, had deteriorated to the point where the couple had decided to divorce. During the divorce proceedings, Wilkinson became so frustrated with his estranged wife that he talked to several friends about killing her and even drew up written plans in case he ever decided to murder her. On May 26, 1991, Wilkinson returned the couple's three-year-old daughter to his wife's home, when he and Gilda began arguing violently over the terms of the divorce settlement. He testified that during the fight Gilda bit him on the finger, and he responded by choking her with his free hand. Wilkinson alleges that because she would not release his finger from her mouth, he tightened his grip on her throat until she stopped moving. Realizing that she was dead, Wilkinson went to his car to retrieve a roll of plastic and his

written murder plans. He attempted to dispose of the body, including amputating both of Gilda's legs, but became ill. He was also interrupted when his girlfriend, concerned because Wilkinson had missed a dinner date, arrived at Gilda's home. Once Wilkinson told his girlfriend he had killed Gilda, she removed Wilkinson's daughter from the home and contacted his parents. Later that same night, Wilkinson tried to commit suicide by flying a stolen airplane into a storm. He was arrested at a nearby airport the next morning.

In August 1992 a jury convicted Wilkinson of first degree murder and concealing a homicide, and he was sentenced to a total of 90 years' imprisonment, which was later reduced to 85 years. He exhausted his state court appeals, and in 1998 filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied the § 2254 petition because it determined that all of Wilkinson's claims were procedurally defaulted. We, however, held on appeal that Wilkinson had indeed presented his attorney ineffectiveness claim to the state courts and therefore had not defaulted on that claim. As a result we remanded the case so the district court could examine the merits of his ineffective assistance claim. *See Wilkinson v. Cowan*, 231 F.3d 347 (7th Cir. 2000).

On remand the district court addressed the one issue Wilkinson had properly preserved: whether his attorney rendered ineffective assistance when he failed to investigate certain alleged "inconsistencies" in the medical examiner's autopsy report of the victim. He argued that there are so many mistakes in the report that it is questionable whether the body the medical examiner identified as Wilkinson's wife was

really her. The district court concluded that Wilkinson failed to demonstrate that he suffered any prejudice as a result of his attorney's failure to investigate the autopsy report. The district court commented that because there was so much evidence of Wilkinson's guilt, he had not shown that the outcome of the trial would have been different had his attorney investigated the autopsy report. As a result the district court denied the § 2254 petition. Two months later, however, the district court granted a certificate of appealability on the issue of whether it should have conducted an evidentiary hearing before denying Wilkinson's § 2254 petition.

AEDPA generally bars a district court from conducting an evidentiary hearing on a claim for which a petitioner has failed to develop a factual basis unless the petitioner makes a detailed showing that a new rule of constitutional law or previously undiscovered facts warrant conducting such a hearing. *See* 28 U.S.C. § 2254(e)(2). But because the lack of a factual record in the state court with respect to the autopsy report cannot be attributed to Wilkinson, § 2254(e)(2) does not apply. *See Matheney v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001). Therefore, we determine whether Wilkinson warranted an evidentiary hearing by assessing whether he demonstrated that 1) the facts, if proven, would entitle him to federal habeas relief and 2) the state courts—for reasons beyond his control—never considered the claim in a full and fair hearing. *See id.*

As the state argues, Wilkinson failed to present facts that if true would provide him with relief. His main factual assertion is that the medical examiner made several

"mistakes" in the autopsy report. Specifically, he claims that 1) the medical examiner misidentified the victim's race, listing the victim as "white," although his wife was Phillipino; 2) the autopsy report described the victim's gallbladder, even though Wilkinson claims that his wife had her gallbladder removed 14 months before the murder; and 3) the medical examiner described the victim's reproductive organs as "unremarkable," despite Wilkinson's claim that his wife had two caesarean sections and two abortions. Wilkinson argues that because of these "inconsistencies" in the autopsy report, the state never proved that he actually killed his wife.

To support that conclusion, Wilkinson highlights two faults with the state's case. First, he suggests that because the autopsy report was so riddled with errors, it is highly possible that the medical examiner fabricated the cause of death as strangulation. He even goes so far as to offer other medical solutions for why the victim died: she choked on a piece of flesh or went into cardiac arrest unrelated to the strangulation. Alternatively, Wilkinson suggests the state failed to meet its burden because it never proved that Wilkinson killed his *wife*, just that he killed the unknown victim on whom the autopsy was performed.

Both of these arguments miss the mark. We remanded Wilkinson's case in order for the district court to evaluate the merits of his ineffective assistance of counsel claim, which it did thoroughly. The district court examined trial counsel's performance and found that given the overwhelming evidence of his guilt, even without a challenge to the allegedly faulty autopsy report, Wilkinson failed to

show that he was prejudiced in any way by trial counsel's decision not to explore the autopsy issue. Conducting an evidentiary hearing is only necessary when a more extensive factual record must be compiled to decide an issue, *see Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002), which was not the case here. The district court determined that because of the other evidence of his guilt Wilkinson would not be able to establish that he had been prejudiced by the failure to investigate the autopsy report. The district court did not err in deciding that further inquiry through an evidentiary hearing was unnecessary given the facts already before it.

Wilkinson also argues that the district court incorrectly decided the merits of his ineffective assistance claim, but the district court's certificate of appealability encompassed only whether an evidentiary hearing should have been conducted. Therefore, we construe Wilkinson's quarrel with the merits of the district court's decision as a request for a certificate of appealability on the ineffective assistance claim itself. *See Rutledge v. United States*, 230 F.3d 1041, 1047 (7th Cir. 2000). A certificate of appealability on this issue will be granted only if Wilkinson makes a substantial showing of the denial of a constitutional right such that reasonable jurists could debate whether his ineffective assistance claim should have been resolved differently. *See id.*

Applying the two-part standard announced in *Strickland v. Washington*, 466 U.S. 669 (1984), as the district court did, Wilkinson does not show that he was prejudiced by trial counsel's decision not to investigate the autopsy report. As the district court noted, the autopsy report was used only to corroborate Wilkinson's own testimony that he killed his

wife by strangling her. Given this minor role of the autopsy report and the overwhelming amount of other evidence demonstrating his guilt, Wilkinson simply did not demonstrate a reasonable probability that had counsel objected to the autopsy report the outcome of the trial would have been different. *See Bell v. Pierson*, 267 F.3d 544, 558 (7th Cir. 2001). Therefore, Wilkinson has not shown the substantial denial of a constitutional right with respect to his ineffective assistance claim, and a certificate of appealability will not now be granted on this issue.

Wilkinson also argues that the district court failed to follow the mandate of this court because it denied his ineffective assistance claim "without giving any consideration to the merits of that claim." He seems to be arguing that the district court somehow failed to consider the ineffective assistance theory (concerning the autopsy report) because the court focused on the trial evidence showing Wilkinson's intent to kill. He reasons that because the intent-to-kill evidence was discussed by the *state* appellate court and this court's mandate instructed the district court to discuss issues raised in his *federal* habeas petition, the district court disregarded the mandate. But the district court did focus on the attorney ineffectiveness claim raised in the federal § 2254 petition. Wilkinson's confusion seems to rest with the district court's conclusion that because there was no prejudice from counsel's actions, it need not evaluate whether counsel's performance was objectively unreasonable. But we have often approved this method of analyzing the prejudice prong of the two-part *Strickland* standard before assessing counsel's performance and ending the discussion once the court determines no prejudice was shown.

See Matheney, 253 F.3d at 1042; *United States v. Ruzzano*, 247 F.3d 688, 696 (7th Cir. 2001). Thus, the district court did not ignore the mandate of this court as Wilkinson suggests.

Wilkinson also contends that the district court was incorrect to focus on the intent-to-kill evidence because the "questionable" autopsy casts doubt on whether the state proved he killed the victim and that the victim was his wife. But this argument suggests that the autopsy report was the only evidence used to convict him, which is simply not accurate. The state also presented to the jury Wilkinson's own statement to his girlfriend that he had killed his wife, the written plans to kill his wife that he had drawn up months before the murder, his statements to his friends that he was going to kill her, and his attempt to conceal his crime by hiding her body and trying to kill himself. The state presented this evidence to allow the jury to infer that he had killed his wife, and none of this evidence has been challenged. Therefore, Wilkinson has not shown that trial counsel's failure to investigate the alleged mistakes in the autopsy report had any impact whatsoever on the jury's decision to convict him.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 25, 2002

BEFORE: Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01-4372

MARK WILKINSON,

Petitioner - Appellant,

v.

JONATHAN R. WALLS, Warden of the Menard Correctional Center, Menard, Illinois,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 98 C 3430, George W. Lindberg, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AND FILED OCTOBER 22, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 3430

JUDGE GEORGE W. LINDBERG

UNITED STATES OF AMERICA, ex rel.
MARK WILKINSON,

Petitioner,

-vs-

ROGER D. COWAN,

Respondent.

MEMORANDUM AND ORDER

Mark Wilkinson, a prisoner in custody of the Illinois Department of Corrections, has filed a petition for habeas corpus relief. For the reasons set forth below, the petition is denied.

In 1992, petitioner was convicted of first degree murder and concealment of a homicidal death following a jury trial in the Circuit Court of Cook County, Illinois. He was

sentenced to consecutive 70 and 10-year terms of imprisonment. Petitioner challenged that conviction in the state courts of Illinois by a direct appeal and simultaneously sought post-conviction relief. Among other things, he argued that his trial counsel was ineffective for failing to investigate (or to provide him with a copy of) the medical examiner's autopsy report, which contained certain obvious discrepancies. After the circuit court summarily dismissed petitioner's petition, his appellate counsel sought leave to withdraw, asserting that his case presented no issue of arguable merit. The Illinois appellate court, upon review of the record, agreed. It granted the motion to withdraw, and summarily affirmed the circuit court's judgment dismissing the post conviction petition.

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising several claims, including one of ineffective assistance of counsel. This Court determined that petitioner had procedurally defaulted the ineffectiveness claim by failing to present the claim to the Illinois appellate court. On appeal, the United States Court of Appeals for the Seventh Circuit reversed in part, holding that the ineffectiveness claim in question had not been defaulted and remanded the case to this Court to decide that claim on the merits. *Wilkinson v. Cowan*, 231 F.3d 347 (7th Cir. 2000).

Essentially, petitioner contends that his attorney should have discovered the errors in the autopsy report; alternatively, he asserts that he was familiar with his wife's medical history and would have discovered discrepancies in the report himself if only his attorney had provided him with a copy as

he requested. Had these errors been exposed at trial, petitioner argues, they would have undermined the credibility of the autopsy report, weakened the State's case for the proposition that petitioner deliberately strangled his wife, and obviated the need for petitioner to testify. Respondent, Roger D. Cowan, asserts that the conduct of petitioner's counsel was reasonable in light of other evidence, and in the alternative that any errors by petitioner's counsel did not result in prejudice to petitioner.

To prevail on a claim of ineffective assistance of counsel, a petitioner must establish: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's unreasonable performance prejudiced petitioner, creating a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both components of the test must be present; the lack of either is fatal to an ineffectiveness claim. *Id.* at 697. A federal court need not evaluate whether counsel's conduct failed to meet an objective standard of reasonableness, where the petitioner fails to satisfy the "prejudice" prong of the Strickland test. *Id. See also Winsett v. Washington*, 130 F.3d 269, 280 (7th Cir. 1997) ("It is often beneficial for courts to consider the prejudice prong of the *Strickland* test before delving into murkier questions of whether certain acts or decisions constituted reasonable legal advocacy."); *Cochrane v. Cooper*, 1998 U.S. Dist. LEXIS 8420 at * 15 (N.D.Ill. 1998).

The "prejudice" component of the *Strickland* test focuses on the question of whether counsel's performance renders the result of the trial unreliable or the proceeding

fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Prejudice under this standard refers to unprofessional errors so egregious that "the trial was rendered unfair and verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Therefore, in order to succeed in ineffective assistance of counsel claim, petitioner must show that but for the performance of his lawyer, the result of the trial would have been different. In looking at the trial record, there are numerous other facts that show there is no reasonable probability that the outcome of the trial would have been different had petitioner's testimony and the autopsy report not been included at trial.

Petitioner, an airline pilot, was in the process of divorcing his wife Gilda in 1991. He wrote in a letter to his parents, read into evidence during trial, that on May 26 of that year, after driving his daughter to their home in the Chicago suburb of Hoffman Estates, he and Gilda began to argue about the divorce settlement. The argument escalated and, according to petitioner:

> Gilda has attacked me on many occasions and last night was the last straw. She punched me in the right arm and clawed my right forearm in 12 places and then bit my small left finger so hard it drew blood and it was so deep some of the muscle came out and I had a difficult time moving it after that. I had enough and I slapped and I strangled her . . . She kept coming at me and I had to stop her. I couldn't take anymore, especially after she said I kept harassing her all the time, hitting her a lot, et cetera.

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The evidence at trial established that petitioner previously had talked about the possibility of killing Gilda with several of his friends. Petitioner started off joking about it, but became more and more serious as time went by. Relations with his wife rapidly deteriorated throughout the divorce proceedings. The evidence included testimony about an offer by petitioner to pay a friend $10,000 to have his wife "eliminated." Petitioner had even detailed a variety of murder scenarios on his computer. These scenarios were extremely detailed, with lists of what he needed to do, when he needed to do it, and what supplies he would need to accomplish the murder and how to escape punishment for murdering his wife.

After the fatal struggle between petitioner and his wife, petitioner realized that the circumstances surrounding Gilda's death were incriminating, and thus he consulted the print-out of murder scenarios he had carried with him in his car. He decided that he should follow one scenario where he would cremate Gilda's body and claim that she was missing. He went so far as to wrap her body in plastic (there was a roll of it in the trunk of his car) and to partially dismember the corpse so that it would fit into a fireplace. He was interrupted in this task when his girlfriend, her suspicions aroused by a telephone call by petitioner canceling their dinner date, came to the house and confronted him. Petitioner attempted to cover up the events of the evening by not allowing his girlfriend into the house for several hours. Eventually, due to his girlfriend's persistent questioning regarding his behavior that night, petitioner told her that he had killed Gilda and acknowledged that he had put his hands around her neck to do it. Petitioner's girlfriend then took the petitioner's daughter from the house and telephoned his parents. Petitioner fled from the house at that time.

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Petitioner later stole a plane from a suburban airport and flew it into a storm front, purportedly to commit suicide. However, the plane remained airborne. He then landed the plane, but took off again when he spotted a police car approaching. He flew to an airport near Kankakee, Illinois, where he spent the night and was arrested the following morning.

A central issue at petitioner's trial was whether he intended to kill Gilda, or possessed the requisite intent to otherwise be found guilty of murder. Among the evidence that the State relied upon to show that petitioner deliberately strangled her was the autopsy report, which indicated that Gilda's Adam's apple had been crushed. Petitioner alleges that he asked his attorney to provide him with a copy of the report in advance of trial so that he could review the report himself, but his attorney failed to do so. When he examined the report after the trial, petitioner discovered several discrepancies. Most importantly, the report indicated that the coroner had removed the gallbladder and sent it for toxicological examination, but petitioner contends Gilda's gallbladder had been surgically removed fourteen months prior to her death. The report also indicated that the body was free of scars, although petitioner contends Gilda had obvious scars not only from the removal of her gallbladder but also from the Caesarian section that had been performed when she gave birth to her daughter. Other discrepancies claimed by petitioner were an inaccurate time and date of death (one day later than the events described by petitioner), and an inaccurate identification of Gilda's race as White, instead of her true Filipino origin.

Appendix B

There is no reasonable probability that the outcome of the trial would have been different even assuming that the conduct of counsel was deficient in not attacking the validity of the autopsy report. Intent to kill can rarely be proved directly; Illinois permits the fact finder to infer the defendant's intent from his acts and the surrounding circumstances, including the character of the assault, the use of a deadly weapon, and other relevant circumstances. *See, e.g., People v. Buford*, 235 Ill. App. 3d 393, 405, 601 N.E.2d 1099, 1108 (1992); *People v. Agee*, 205 Ill. App. 3d 146, 151, 562 N.E.2d 545, 548 (1990). "Specific intent to kill may be shown by surrounding circumstances, including the character of the assault and the use of a deadly weapon," and "such intent may be inferred if one willfully does an act, the direct and natural tendency of which is to destroy another's life." *People v. Hill*, 276 Ill. App. 3d 683, 687, 658 N.E.2d 1294, 1297 (1995). The facts recited above show that petitioner had thought about killing his wife for quite some time. He had talked about it with friends. He had attempted to persuade one of them to "eliminate" his wife. He had prepared plans on how to murder his wife and escape punishment. His state of mind, as described by petitioner himself, shows a deliberate intent to strangle Gilda. When the fatal moment came, he carried out one of his previous plans. The autopsy report was used to only add to these facts by showing the Adam's apple was crushed through manual strangulation, which was consistent with petitioner's own story of how he killed Gilda, and was not essential to petitioner's conviction. Therefore, petitioner suffered no prejudice from his attorney's failure to attack the credibility and accuracy of the autopsy report.

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In addition, petitioner's own account of the altercation does not agree with his claim of self-defense. Self-defense requires that the petitioner must have been acting under reasonable belief that the use of force, which was intended or likely to cause death or great bodily harm, was necessary to prevent imminent death or great bodily harm to himself. *People v. Murillo*, 225 Ill.App.3d 286, 292 (1st Dist. 1992), appeal denied 596 N.E.2d 634. A mouth and teeth can create great bodily harm, and can be considered dangerous weapons, regardless of the presence or absence of AIDS. *See United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988). However, in the present case, the element of reasonable belief that great bodily harm was imminent is missing. Petitioner's account depicts Gilda's act of attacking him and biting his finger as "the last straw." Petitioner then decided that he had had enough and then slapped her and strangled her. In petitioner's account, Gilda was no longer biting his finger at the time he strangled her. No reasonable jury would conclude that petitioner's act of strangulation was necessary to prevent imminent death or great bodily harm. His description of the events showed a conscious decision to strangle Gilda, with no evidence of panic, fearful thoughts about his finger, or that he was in serious danger. Petitioner's account is full of his thoughts, such as "I couldn't take anymore" and "I had enough" and "the last straw." Petitioner's description does not fit with a reasonable self-defense claim.

Therefore, petitioner has failed to show how the outcome of the trial would be unreliable, or that there is a reasonable possibility that the jury would have returned a different verdict. Thus the "prejudice" prong of an ineffective assistance of counsel claim fails, and the writ must be denied.

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ORDERED: Petitioner Mark Wilkinson's petition for writ of habeas corpus is denied. Judgment in favor of respondent, Roger D. Cowan, and against petitioner will be set forth on a separate document and entered in the civil docket. FRCP 58, 79(a).

ENTER:

s/ George W. Lindberg
GEORGE W. LINDBERG
Senior U.S. District Judge

DATED: Oct. 22, 2001

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 16, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 2002

Before

Honorable JOHN L. COFFEY, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 01-4372

MARK WILKINSON,

Petitioner-Appellant,

v.

JONATHAN R. WALLS,

Respondent-Appellee.

Appendix C

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 98 C 3430

George W. Lindberg, Judge.

ORDER

On consideration of the petition for rehearing filed by the petitioner-appellant on August 8, 2002, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D — AFFIDAVIT OF DR. JOHN R. FEEGEL DATED JUNE 2, 1999

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

AFFIDAVIT

(1) My name is John R. Feegel and I am a doctor of medicine specializing in pathology and licensed to practice medicine by the State of Florida.

(2) I am certified in anatomic and forensic pathology by the American Board of Pathology.

(3) I have been Chief Medical Examiner in Tampa and Associate Chief Medical Examiner in North Carolina and Atlanta as well as Associate Professor of Pathology at the University of North Carolina and Emory University (Atlanta).

(4) I have reviewed the autopsy report on Gilda Wilkinson (561-May-1991) signed by Robert J. Stein, M.D. As well as copies of color photographs alleged to be of Gilda Wilkinson, certain laboratory reports on autopsy-obtained material, selected old surgical and postoperative pathology reports on Gilda Wilkinson, certain "crime lab" reports, and note at least the following discrepancies in the autopsy report

(a) Gilda Wilkinson was a Filipina, not a white or caucasian female

(b) Her teeth were not in poor repair as evidenced by the photograph and report of her dental hygiene

(c) The abdomen fails to list a scar from her previous caesarian section nor from her previous gall bladder removal

(d) The gall bladder is allegedly identified at autopsy yet a cholecystectomy was performed on March 3, 1990 and the gall bladder measured and described along with its gallstones by a pathologist post-operatively on May 15, 1990

(e) The uterus is described at autopsy as "not remarkable" whereas in fact at least one scar from the previous caesarian section would have been seen on careful inspection

(5) At least these errors or inconsistencies raise the reasonable inference that the Medical Examiner, Robert J. Stein, M.D., performed the autopsy on a decedent other than Gilda Wilkinson or otherwise contrived, or fabricated the autopsy in whole or in part, other than conclusions that are obvious in the post mortem photographs of the outside of the body.

FURTHER, THE AFFIANT SAYS NAUGHT

s/ John R. Feegel, M.D.
JOHN R. FEEGEL, M.D.

APPENDIX E — STATUTE INVOLVED

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Appendix E

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * * *